

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Sprint Communications Company, :	
L. P. for Approval to Offer, Render, Furnish or :	Docket Nos. A-310183F0002AMA
Supply Telecommunications Services to the Public :	A-310183F0002AMB
in the Commonwealth of Pennsylvania :	A-310183F0002AMC

**PROTEST AND MOTION TO DISMISS OF
COMMONWEALTH TELEPHONE COMPANY
TO THE APPLICATION OF
SPRINT COMMUNICATIONS COMPANY, L. P.**

NOW COMES the Commonwealth Telephone Company ("CTCo"), by and through its attorneys, Hawke McKeon Sniscak & Kennard LLP, and files this Protest and Motion To Dismiss to the above-referenced Application pursuant to 52 Pa. Code § 5.51. In support thereof, CTCo avers as follows:

I. BACKGROUND

1. On or about May 4, 2005, Sprint Communications Company, L. P. ("Sprint" or "Applicant") filed an Application with the Pennsylvania Public Utility Commission ("Commission") for approval to offer, render, furnish or supply telecommunications services as a

"competitive local exchange carrier"¹ in a portion of the Commonwealth of Pennsylvania served by several rural local exchange carriers.

2. The service territory in which operating authority is sought in this Application includes the service territory of CTCo and, accordingly, CTCo has a direct, immediate and substantial interest in the Application, conferring upon it the standing necessary to assert this Protest and Motion.

3. Sprint describes its proposed service as follows:²

The Applicant seeks authority to offer competitive alternatives in telecommunications services, pursuant to §251(a) (direct and indirect interconnection) and §251(b)(2) (number portability), (3) (dialing parity) and (5) (reciprocal compensation) of the federal Telecommunications Act to competitive service providers seeking to offer local voice services.³

The facilities that Sprint intends to offer to other carriers will include switching and transport.⁴

4. Sprint describes the customer base to which it proposes to market its services as follows:

The Applicant is seeking authority to provide telecommunications services to competitive service providers throughout the ILEC territories of [Commonwealth Telephone Company, Alltel Pennsylvania, Inc. and Palmerton Telephone Company].⁵

5. The proposed tariff changes, designed by Sprint to effectuate its application, are attached to the Application. These changes simply add the recurring statement that:

Sprint provides services to competitive service providers under contracted terms or conditions that are not a part of this tariff in all

¹ Application at 6 (¶ 9).

² Sprint provided this description in response to the Commission's direction to "clearly and separately delineate the services within each proposed operation. See Application at 7 (¶ 10) (Instructions).

³ Application at 7 (¶ 10) (emphasis added).

⁴ *Id.*

⁵ Application at 7 (¶ 12) (emphasis added).

or portions of the Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company exchanges.⁶

On the other hand, the services that Sprint already provides in Verizon Pennsylvania Inc. exchanges are described as “end user local exchange telecommunication services.” Local services are not proposed to be extended to end users in CTCo’s service territory.⁷ Sprint will only serve “competitive service providers.”

6. Sprint states that it intends to seek ported numbers, dialing parity and reciprocal compensation from CTCo pursuant to the Federal Telecommunication Act of 1996 (“TCA-96”).⁸

7. The full name, address and telephone number of the protestant is:

Commonwealth Telephone Company
100 CTE Drive
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8. CTCo’s attorney, upon whom service of all documents is requested, is:

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⁶ See, e.g., Proposed Tariff at Section 3, 3rd Revised Page 1 (emphasis added).

⁷ Proposed Tariff at 1st Revised Page 1.

⁸ Application at 7 (¶ 10).

II. RURAL TELEPHONE COMPANY

9. CTCo is a rural telephone company as defined under Section 3(37) of the TCA-96,⁹ a designation that this Commission has recognized several times, notably in Orders entered at Docket Nos. M-00960799¹⁰ and P-00961024F1000.¹¹

III. APPLICATION PROCEDURES

10. The Commission, in its TCA-96 Implementation Order, dated June 3, 1996, and in the subsequent Order On Reconsideration, pronounced the entry procedures to be utilized by competitive local exchange carriers ("CLEC") applicants seeking authority within the service territories of rural telephone companies.¹² These procedures apply to Sprint's Application to provide service within the service territories of CTCo.

11. Specifically, this Commission has stated that applications seeking authority to enter the service territory of smaller, rural telephone companies as defined under Section 3(a)(47) of the TCA-96 "will be subject to **normal procedures** under 66 Pa. C.S. Sections 1101 and 1103."¹³ While the Commission has since revised the **entry standards** for "facilities-based"

⁹ 47 U.S.C. § 153(37).

¹⁰ *Re: Implementation of the Telecommunication Act of 1996*, Docket No. M-00960799 (Orders entered June 3, 1996 and Sept. 9, 1996) ("Implementation Order" and "Order on Reconsideration" respectively).

¹¹ *Petition of Commonwealth Telephone Company for an Amended Alternative Regulation and Network Modernization Plan*, Docket No. P-00961024F1000 (Order entered March 3, 2005).

¹² *Implementation Order*, *supra* note 10.

¹³ *Id.*, Order on Reconsideration at 6 (emphasis added).

CLECs,¹⁴ it has not changed the applicable procedures, including the right to a hearing before the granting of authority to operate.

12. These rules have been followed consistently. All three "facilities-based" carrier applications filed in rural telephone company territories and considered by this Commission since passage of the TCA-96 (Vanguard Telecom, AT&T Communications and Adelphia Business Solutions¹⁵) followed the traditional protest and hearing procedures of 66 Pa.C.S. Sections 1101 and 1103.

IV. MOTION TO DISMISS

13. The Commission's regulations at 52 Pa. Code Section 5.101, *et seq.*, provide that a Motion to Dismiss may be filed on the grounds, *inter alia*, that the Commission lacks jurisdiction to adjudicate the case or controversy.¹⁶

14. In filing a preliminary motion, the moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the motion, all well-pleaded

¹⁴ See, e.g., *Application of AT&T Communications of Pennsylvania, Inc. and TCG Pittsburgh to Amend their Certificates of Public Convenience to Begin to Offer, Render, Furnish or Supply Facilities-Based Competitive Local Exchange Telecommunications Services in the Service Territories of ALLTEL Pennsylvania, Inc., Armstrong Telephone Company-Pennsylvania, The Bentleyville Telephone Company, Citizens Telephone Company of Kecksburg, Hickory Telephone Company, Marianna and Scenery Hill Telephone Company, North Pittsburgh Telephone Company, and Yukon-Waltz Telephone Company*, Docket Nos. A-310125F0002 and A-310213F0002 (Opinion And Order entered April 10, 2001) ("AT&T Rural CLEC Application"); See also 66 Pa.C.S. § 3009(a).

¹⁵ *Amended Application of Vanguard Telecom Corp., et al.*, Docket Nos. A-31021F0002 and A-310621F0003, Order entered August 23, 2000 ("Vanguard Rural CLEC Application"); *AT&T Rural CLEC Application*, *supra* note 14; and *Application of Adelphia Business Solutions Operations, Inc. for Approval to Offer, Render, Furnish, or Supply Telecommunication Services as a Competitive Local Exchange Carrier to the Public in the Commonwealth of Pennsylvania, Limited to the Service Territories of Commonwealth Telephone Company, Denver & Ephrata Telephone and Telegraph Company, Frontier Communications of Pennsylvania, Inc., Frontier Communications of Breezewood, Inc., Frontier Communications of Canton, Inc., Frontier Communications of Lakewood, Inc., Frontier Communications of Oswayo River, Inc., and North Pittsburgh Telephone Company*, Docket No. A-310923F0002 ("Adelphia Rural CLEC Application").

¹⁶ Motions to Dismiss on the grounds of jurisdiction may be filed at any time. *Encelewski v. Associated - East Mortgage Co.*, 396 A.2d 717 (Pa. Super. 1978).

material facts of the other party, as well as every inference reasonably deductible from those facts. Similarly, Sprint may not seek to add additional information beyond that included in the original application to buttress the legal validity of its pleading. The motion is granted only if the moving party prevails as a matter of law.

15. CTCo does not believe that the service proposed by Sprint is that of a “local exchange company.” CTCo moves to dismiss the Application, because it would be inappropriate to issue a certificate to authorize it as a “competitive local exchange carrier” when Sprint will not be acting as one.¹⁷

16. CTCo is not aware of any term under federal or state law that defines the service that Sprint intends to offer. Offering “telecommunications services... to competitive service providers seeking to offer local voice services”¹⁸ is not the same as the provision of local service. Rather, it is a privately negotiated, wholesale service provided to another carrier who is providing local exchange service. (Sprint’s proposed tariff amendments are clear on this point – it repeatedly states that this wholesale service will be provided under “contracted” terms that are “not part of [its] tariff[.]” See para. 5, above.) Sprint proposes to offer facilities that a carrier, who actually is providing local exchange service to the public, might use to assist it in the provision of local service. However, Sprint is not offering a complete service, nor is it offering a service to customers so that they can originate and terminate a local call with Sprint as a CLEC. Providing partial facilities that will be used by someone else to provide CLEC service does not render Sprint a CLEC.¹⁹ The correct procedure here would be for the “competitive service

¹⁷ Application at 6 (¶ 9).

¹⁸ Application at 7 (¶ 10).

¹⁹ As discussed below, Sprint’s service is not a “telecommunications service” either.

providers seeking to offer local voice services” to apply directly in its name for a certificate of public convenience.

17. This Commission has defined the term “competitive local exchange carrier” as “[a] telecommunications company that has been certificated by the Commission as a CLEC under the Commission’s procedures implementing the [TCA-96].”²⁰

18. “The term ‘local exchange carrier’ means any person that is engaged in the provision of telephone exchange service or exchange access.”²¹ In turn, “telephone exchange service” means:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.²²

19. Thus, it would not be appropriate to grant Sprint a certificate to be a “competitive local exchange carrier,” as it has requested. The service Sprint proposes to offer in CTC’s service area is not “telephone exchange service” and, thus, Sprint will not be operating as a “local exchange carrier.” There are no “subscribers” for service within an exchange and there is no “exchange service charge.”

20. Nor is the wholesale transport and switching service that Sprint proposes to provide a “telecommunications service” under federal law, which is defined as “the offering of telecommunications for a fee directly to the public, or such class of users as to be effectively available directly to the public, regardless of the facilities used.”²³

²⁰ 52 Pa. Code § 53.57. Similarly, an “Incumbent local exchange carrier” is a “[a] telecommunications company deemed to be an ILEC under section 101(h) of the [TCA-96] (47 U.S.C.A. § 251(h)).” 52 Pa. Code § 63.143.

²¹ 47 U.S.C.A. § 153(26).

²² 47 U.S.C.A. § 153(47) (emphasis added).

²³ 47 U.S.C.A. § 153(46) (emphasis added).

21. Nor is it at all clear that the wholesale transport/switching service described by Sprint is a public utility service under Pennsylvania law. For telecommunications, the Public Utility Code defines a "public utility" as:

- (1) Any person or corporation now or hereafter owning or operating in this Commonwealth equipment of facilities for:

* * *

- (vi) conveying or transmitting messages or communications... by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation.²⁴

22. CTCo does not believe that a certificate is required for what Sprint proposes to do – provide wholesale provision transport/switching functions to other carriers. This is not service "for the public" and, hence, is not jurisdictional. Thus, CTCo believes that Sprint may begin to do so immediately, without being required to file tariffs or undertake any of the other burdens associated with utility regulation.

23. On the other hand, if the Commission believes that what Sprint proposes to do is a utility service, then a description other than local exchange service must be found and the scope of appropriate regulation established. More information, provided by Sprint, is necessary before that effort can be undertaken.

24. Inasmuch as Sprint is not a telecommunications carrier providing local exchange service, Sprint's apparent desire to obtain numbers and number porting is of great concern to CTCo. CTCo does not believe that Sprint is entitled to number porting under the TCA-96. First, blocks of numbers are assigned by the North American Numbering Plan Administrator

²⁴ 66 Pa.C.S. § 102.

("NANPA") to carriers that provide local exchange service (i.e., ILECs, CLECs, and wireless carriers).²⁵

25. Title 47, Part 52 of the FCC's regulations govern numbering and establish "requirements and conditions for the administration and use of telecommunications numbers for provision of telecommunications services."²⁶ In the provisions dealing with administration of numbers, a general requirement is to make "telecommunications numbering resources available on an efficient, timely basis to telecommunications carriers."²⁷ Subsection (g) of the provisions dealing with central office code administration requires that applications for numbering resources include evidence of the following:

- The applicant is authorized to provide telecommunications service in the area for which the numbering resources are being requested; and
- The applicant is or will be capable of providing service within sixty (60) days of the numbering resources activation date.²⁸

26. The carriers whom can obtain numbers and to whom numbers can be ported, therefore, are those who provide "telecommunications services" to the public. Sprint, as a wholesale transporter/switcher, is not entitled to numbers. Numbers go to carriers providing end user services. Therefore, it is critical that this Commission not grant Sprint the right to obtain numbers, if it is not providing "telecommunications services."

27. Moreover, to the extent that Sprint intends to port a number on behalf of a carrier that is not a "telecommunications carrier" either, this also would be contrary to FCC rules. The right to obtain and port numbers does not extend to "information service" providers, such as

²⁵ The NANPA is responsible for managing of the North American Numbering Plan and for administering the numbering resources as detailed in Section 52.13(d) of the FCC's regulations.

²⁶ 47 C.F.R. § 52.1.

²⁷ 47 C.F.R. § 52.9(a)(1) (emphasis added).

²⁸ 47 C.F.R. § 52.15(g)(2)(i)-(ii).

VoIP service providers, absent a waiver of the rule. Several petitions have been filed by information service providers requesting a waiver of Section 52.15(g)(2)(i), quoted above; one petition has been granted²⁹ and others are pending. Numbering rules set by the FCC can only be waived by the FCC, and any customer of Sprint must either comply with the rule or obtain a waiver before seeking to port telephone numbers. This Commission should not endorse any arrangement whereby a wholesale carrier might be able to claim CLEC status in order to obtain numbers for or port on behalf of a VoIP service provider, which, thus far have been treated as "information service providers." In the *SBCI* case, the FCC stated that, absent a waiver, "SBCIS would have to partner with a local exchange carrier (LEC) to obtain North American Numbering Plan (NANP) telephone numbers."³⁰

28. To the extent that the underlying "competitive service provider seeking to offer local voice services" that Sprint wants to serve is an "information service" provider, the appropriate procedure would be for that company to forthrightly seek waiver at the FCC, rather than placing Sprint in the position of "number trafficking."³¹

²⁹ *In the Matter of Administration of the North American Numbering Plan*, CC Docket 99-200, 2005 FCC LEXIS 577 (Feb. 1, 2005). Similarly, the North American Numbering Plan Administrator ("NANPA") Central Office Code Assignment Guidelines dated February 2005 ("Guidelines") require that carriers assigned NXX codes are furnishing facilities-based local exchange service, as authorized by applicable state utility commission. (See February 2005 Guidelines, for example at §§ 2.4, 2.14, 3.1, 4.1.1, 4.2).

³⁰ *Id.* at 6 (emphasis added).

³¹ Under NANPA rules, numbers may not be sold, brokered, bartered or leased. Guidelines at 2.1.

V. PROTEST

29. Pursuant to 66 Pa.C.S. Section 332(a), an Applicant bears the burden of proof as to all issues relating to its Application and must prove all necessary elements by substantial evidence or its application must be denied.³²

30. The Pennsylvania Public Utility Code imposes a two-part test in its review of CLEC applications. The Commission may certify more than one local exchange company in a service territory, upon a showing by the applicant that:

- (a) The application is "in the public interest;" and
- (b) The applicant "possesses sufficient technical, financial and managerial resources."³³

31. As part of its burden, Sprint must demonstrate that the proposed service and method of operation is lawful and in the public interest.³⁴

A. LAWFULNESS OF PROPOSED SERVICE

32. At Paragraph 12 of the Application, Sprint describes its proposed scope of operation as a wholesale service.

33. CTCO does not believe that the service proposed, as described by the Applicant, is jurisdictional.

34. To the extent that the Applicant proposes to use CLEC authority to obtain or port numbers without providing local exchange service, this would be in violation of FCC rules.

35. Therefore, the CTCO asserts that the proposed service is not jurisdictional and/or is illegal and the Application should be denied.

³² *Re: Mobil Phone of Northeastern Pennsylvania*, 54 Pa. P.U.C. 521 (1980).

³³ 66 Pa.C.S. § 3019(a).

³⁴ See also *Penn Access*, *infra*.

B. LEGAL FITNESS

36. The Applicant must prove that it has the necessary fitness to provide the proposed service to the public. The Commission previously has adopted a three-part definition of fitness as follows:

- (a) Technical fitness: The applicant must have the ability to actually provide the necessary service;
- (b) Financial fitness: An applicant must have the financial ability to make the necessary investment in equipment and facilities and should have sufficient financial capacity to ensure that adequate service will be rendered to the public; and
- (c) Legal fitness (or the prosperity to operate legally).³⁵

37. The Applicant must prove that it possesses these attributes.

C. WITHDRAWAL OF PROTEST

38. CTCO would agree to withdraw its Protest if the Applicant does not seek a certificate from this Commission.


³⁵ *Seaboard Tank Lines, Inc. v. Pa. Public Utility Comm'n*, 502 A.2d 762 (Pa. Cmwlth. 1985). The fitness criteria include: (1) technical capacity to render the proposed service; (2) financial fitness to provide and maintain safe, reliable and reasonable service and facilities; and (3) the applicant must not have exhibited a disregard for the Public Utility Code and the Commission's orders and regulations thereunder, i.e. that is legal fitness. *Re Perry Hassman*, 55 Pa. P.U.C. 661 (1982); *See also Re Penn Access Corp.*, 76 Pa. P.U.C. 339 (1992) and *Re Evansburg Water Company*, 81 Pa. P.U.C. 152 (1994).

VI. CONCLUSION

39. Applicant has failed to meet its burdens with regard to its Application to provide service in the territory of CTCO.

WHEREFORE, the Commonwealth Telephone Company respectfully requests that the above referenced Application be dismissed or, in the alternative, be denied.

Respectfully submitted,



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Date: June 6, 2005

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing document upon the person named and in the manner indicated below.

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